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NO. 82-1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID P. MICHAELS, TRUSTEE OF MARIN MOTOR OIL, INC.,

Petitioner,

and by Separate Petition

MARIN MOTOR OIL, INC., NICHOLAS MARIN, NICK-O-MAR REALTY CORP., PETROBRAS COMPANY, INC., MARIN RETAIL GASOLINE SALES COMPANY, MARIN OIL CO., INC., FRA-MAR, INC., MARIN MERCANTILE OIL EXCHANGE and MARIN DRILLING CORP.

Petitioners,

v.

OFFICIAL UNSECURED CREDITORS' COMMITTEE,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

THOMAS J. O'NEILL
Counsel of Record for Respondent,
60 Park Place,
Newark, New Jersey 07102
(201) 643-6300

NOLAN, O'NEILL & MOORE,
Attorneys for Respondent.

WILLIAM F. McENROE,
CORINNE M. DeSTEFANO,
On the Brief.

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

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BRIEF FOR RESPONDENT IN OPPOSITION

Statement of the Case

This case pertains to two adversary proceedings pending before the United States Bankruptcy Court for the District of New Jersey, i.e., *David P. Michaels, Trustee* v. *Nicholas Marin, Ilse Marin, Nick-O-Mar Realty, et al.*, Ad-

versary No. 81-0616, and *David P. Michaels, Trustee* v. *Nicholas Marin, Ilse Marin and Marin Holding Company,* Adversary No. 81-0639.

The first proceeding seeks, *inter alia,* to extend the proceedings to include each of the named defendants. The latter seeks, *inter alia,* to bring into the debtor's estate certain residential properties and personalty located therein. Both of the proceedings were commenced by the Trustee based upon information gathered by counsel for creditors (who are members of the Committee) during the course of depositions (pursuant to §205(a) of the Bankruptcy Code) of Nicholas Marin on April 30, 1981, May 6, 1981 and May 15, 1981. The information which was obtained disclosed *inter alia* that:

(a) Nicholas Marin, in addition to owning and controlling the debtor, Marin Motor Oil, Inc. owned (with his wife) and controlled Marin Oil, Inc., Nick-O-Mar Realty Corp., Petrobras Co., Marin Retail Gasoline Sales Co., Fra-Mar, Inc., Marin Aviation, Inc. and Marin Holding Company.

(b) The combined financial statements and net worth of these companies were used to obtain lines of credit amounting to several million dollars to engage in commodity trading operations which led the debtor to seek protection from the Bankruptcy Court.

(c) Certain of the Marin controlled entities had title to real estate valued in excess of a million dollars, including two acres of land on Route 17, Paramus, New Jersey. In addition, they received funds from Marin Motor Oil, Inc. out of common corporate bank accounts.

(d) Nicholas Marin admittedly owed the debtor at least $818,077.00. This diversion of corporate funds was used as follows:

1.	purchase of a residence in Tenafly, New Jersey for speculative purposes	$750,000.00
2.	purchase of built-in furniture in Tenafly home, paid four months *after* the closing on the house, but within days of filing the Bankruptcy petition	42,192.47
3.	paid for flooring in the Tenafly residence	3,000.00
4.	real estate taxes for the Tenafly residence	4,205.94
5.	disposition of the balance is unknown	18,678.59
	TOTAL	$818,077.00

(e) The Deed named Marin Holding Company, as the owner of the Tenafly residence. The entity was controlled by Nicholas Marin as its sole officer and director, and it had not issued any capital stock. The Deed reflected a paid consideration of $550,000.00, although an additional *$200,000.00* in cash was paid to the seller out of the corporate bank account of Marin Motor, Inc.

(f) During the May 6, 1981 examination of Nicholas Marin, he testified that he would transfer the title of the Tenafly real property back to Marin Motor Oil, Inc. Sheldon Schachter, his attorney, indicated that he would file an application in the Bankruptcy Court to transfer the deed back into Marin Motor Oil, Inc.

(g) Nicholas Marin used $85,000.00 of the funds of Marin Motor Oil, Inc. to purchase a seat on the Commodities Future Exchange.

(h) Contrary to sworn testimony that Marin Holding Company held title only to the Tenafly residence, it was

discovered by counsel for the Committee that the company also held title to a residence on Blue Bell Court, Paramus, New Jersey occupied on a non-rent basis by Rose Grasso Domansky, a putative former employee of Marin Aviation, Inc.

(i) Nicholas Marin used $86,440.00 of the debtor's corporate funds to buy property in Acapulco, Mexico.

Complaints were filed by the Trustee in the adversary proceedings in July, 1981.[1] Intervention by the Committee was prompted by the fact that the proceedings had not moved expeditiously during the ensuing months and the fact that a stipulation between the Trustee and the Marins freezing the assets of the Marins and its controlled entities had been permitted to lapse for a period of approximately 45 days.

On October 5, 1981, the Committee filed a motion to intervene in adversary proceeding No. 81-0639. The motion was, thereafter, expanded to include adversary proceeding No. 81-0616. The Bankruptcy Court in a letter opinion and Order dated October 22, 1981, decided that the Committee had no absolute right to intervene under §1109(b) of the Bankruptcy Code. Instead, it concluded that intervention was permissive rather than mandatory. The Bankruptcy Court, however, granted the Committee the status of *amicus curiae* with its participation in the proceeding "limited to the submission of briefs."

The Committee filed a Notice of Appeal to the United States District Court on October 22, 1981. The appeal was

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[1] The adversary complaints were filed after the Committee had stipulated to a dismissal of its own adversary proceeding, which had been filed on May 15, 1981, with the understanding that the attorneys for the Trustee would vigorously pursue the matter and obtain an order freezing the assets of the Marins and their controlled entities.

heard by the Honorable Herbert J. Stern who reversed the Order of the Bankruptcy Court. Judge Stern ruled that the Committee, pursuant to §1109(b), had the right to intervene. Judge Stern further concluded that *amicus curiae* status afforded under the decision of the Bankruptcy Court was insufficient to fully protect the rights of the Committee. Accordingly, on November 12, 1981, an Order was entered by the United States District Court reversing the Order of the Bankruptcy Court. Thereafter, the Debtor and the Trustee filed Notices of Appeal to the Third Circuit Court of Appeals on November 25, 1981 and December 2, 1981, respectively. The appeals were subsequently consolidated.

On September 29, 1982, the Court of Appeals issued its decision affirming the Order of the District Court.

ARGUMENT

POINT I

As held by the District Court and the Court of Appeals, respondent was entitled to intervene in the pending adversary proceedings pursuant to 11 U.S.C. §1109(b).

Section 1109(b) of the Bankruptcy Code, 11 U.S.C. §1109(b), was enacted by Congress as a means of affording to creditors' committees a right to intervene and be heard with respect to "any issue" in a bankruptcy case. See 124 Cong. Rec. 17419 (Daily Ed. Oct. 6, 1978) (Remarks of Rep. Edwards). The legislative history to subsection (b) indicates that the subsection:

> Provides, in *unqualified terms,* that any creditor, equity security holder or an indenture trustee shall

> have the right to be heard as a party in interest under this chapter in person, by any attorney or by a committee. It is derived from §206 of Chapter X (11 U.S.C. §606). (emphasis added).

Senate Report No. 95-989, 95th Cong. 2nd Sess. (1978) 116.

Congress, by specifically stating that §206 of the former Act (rather than §207) was the source for §1109(b) of the Code, had to have been aware of the construction placed upon §206 by the Courts. Under §206 of the former Act, the Courts were uniform in their support of the rule that the cited section conferred an absolute right on the persons named in the statute. See *Rudnik* v. *Coney Island Boardwalk Corp.*, 181 F. 2d 755, 776 (2d Cir. 1950); *In re South Street Building Corp.*, 140 F. 2d 363, 367 (7th Cir. 1943), cert. denied sub nom. *Hofheimer* v. *Gold*, 322 U.S. 761, 64 S. Ct. 1279, 88 L. Ed. 1588 (1944); *Dana* v. *Securities Exchange Commission*, 125 F. 2d 542 (2d Cir. 1942); *In re Flour Mills of America, Inc.*, 27 F. Supp. 559 (W.D. Mo. 1939); *In re 8309 Talbot Corp.*, 27 F. Supp. 40 (E.D. N.Y. 1939).

Bankruptcy Courts have been uniform in applying §1109 (b) consistent with the Congressional intent to confer an absolute right. Thus in *In re Citizens Loan and Thrift Company*, 7 B.R. 88 (B. Ct. Iowa 1980), the Court said:

> As stated in the official comment to §1109(b), the section "continues the broad concept of the absolute right to be heard in order to insure fair representation in the case . . ." The Collier treatise suggests that the standing conferred by §1109(b), like that conferred by §206 of the Bankruptcy Act and Bankruptcy Rule 10-210(a)(1), on which §1109(b) is based, is absolute and unlimited, giving those listed "the same rights as if they were successful inter-

> venors without the necessity of a formal order of intervention." 5 Collier Id. at page 1109-19. In other words, a party coming under the provision of §1109 (b) may appear and be heard without filing a motion to intervene.

Id. at 90.

In another case, *In re Sapolin Paints, Inc.*, 6 B.R. 582 (B. Ct. N.Y. 1980), the Court considered whether a bank should intervene in an adversary proceeding commenced to void a lien held by the bank on certain notes. The Court said:

> Section 1109(b) of the Bankruptcy Code, 11 U.S.C. §1109(b), confers upon a creditor in an arrangement proceeding the right to "appear and be heard on any issue in a case" under Chapter 11 of the Bankruptcy Code.
>
> Further, there can be no doubt that what is here involved is a "case" under the Code. While that term, unlike "creditor" is not defined, an authoritative text notes that it "embraces all controversies determinable by a Court of Bankruptcy." 2 Collier on Bankruptcy ¶301.03 at 301-3 (15th Ed. 1979). See *In re Cloud Nine Ltd.*, 3 B.R. 199 (B. Ct. D. N.M. 1980) (Creditor had right to intervene to represent his own interests in adversary proceeding commenced by secured creditor to obtain relief from automatic stay).
>
> United and Metropolitan, however, would deny the words of the staute their plain meaning on the theory that the legislative history of §1109(b) indicates that creditors, like Chemical, with concerns special to them alone were not intended to be included.

> It is debatable whether any resort to legislative history is appropriate where the words of the statute are not only plain, but have been themselves defined by the legislators."

Id. at 583. See *In re Penn-Dixies Industries, Inc.*, 9 B.R. 936, 939 (B. Ct. N.Y. 1981); *In re Cloud Nine, Ltd.*, 1 C.B.C. 2d 589 (B. Ct. N.M. 1980).

Petitioners contend that committees have the right to intervene only in the administrative aspects of a Chapter 11 "case" and that the right to intervene in actual controversies is limited. In addition, petitioners contend that "case" excludes any "adversary proceeding".

Petitioners are wrong in advancing such argument on two basic counts. Foremost, §1109(b) plainly states that a party in interest "may appear and be heard *on any issue* in a case under this Chapter". (emphasis added). Congress in enacting §1109(b) did not limit or otherwise modify the term "issue" to only the administrative issues which arise in a bankruptcy case. In using the phrase "any issue", Congress evidenced a clear intent to make the right to intervene as broad and all encompassing as possible. Through a tortured and unjustified reading of the Bankruptcy Code, petitioners have read into the statute something which is plainly not there. As stated in *Colliers*:

> The term "bankruptcy case" used throughout the rules refers to the entire legal action in bankruptcy. It is the widest term functionally. Other terms are used to designate steps within the case. The term "proceeding" is used to refer to any subaction within the case, including adversary proceedings, which may raise a disputed or litigated matter.

2 *Collier on Bankruptcy*, ¶301.03 at 301-4 (15th Ed. 1982).

By confining the Congressional language to the administrative aspects of a "case", petitioners would have this Court confer a conditional right in those matters which are of the greatest importance to the creditors and other parties in interest. As the case *sub judice* makes abundantly apparent, creditors are most interested in those matters which have an impact upon the value of the estate, in either a negative or positive manner. It would not make sense for Congress to exclude a creditors' committee from an adversary proceeding that might include the recovery of valuable properties, the voiding of preferences, or perhaps the lifting of automatic stays involving valuable property rights of the debtor, while granting the committee an unlimited right to be heard on administrative matters which have a lesser impact on the value of the ultimate claims.

In support of the argument that a creditors' committee is prohibited from intervening in an adversary proceeding, petitioners cited both in oral argument before the Court of Appeals and in their Petitions for Certiorari the case of *In re Segarra,* 14 B.R. 870 (B. Ct. D.P.R. 1981). In its decision, however, the Third Circuit dismissed *Segarra* by stating:

> The *Segarra* Court seems to have conflated two distinct questions: First, whether Section 1109(b) creates "new causes of action in favor of creditors and committees"; second, whether 1109(b) gives creditors and committees an absolute right to intervene in adversary proceedings already initiated by a trustee or debtor in possession. Only the former issue was present in *Segarra.* To the extent that the Court may have intended to express a negative answer to the second question—and we are not certain if this is what was intended—its statements are dicta.

Matter of Marin Motor Oil, Inc., 689 F. 2d 445, 456 (3rd Cir. 1982).

Petitioners further argue that if the Court were to sustain the position of the committee, it would open a Pandora's Box and work a procedural nightmare upon the Bankruptcy Court and every litigated controversy before it. This argument is equally specious.

First, the substance of the petitioner's argument is that, as a matter of public policy, the Court should read §1109(b) as conferring only a conditional right. It is well established that where Congress has made a decision as to public policy, it is not within the Court's province to substitute its own judgment. See *In re Philadelphia, Reading, Coal and Iron Company*, 105 F. 2d 358 (3rd Cir. 1939). In enacting §1109(b) the Congress has evidenced a purpose to make bankruptcy proceedings as open as possible to wrest the control of the case away from insider groups. The unqualified right granted by §1109(b) promotes this purpose and should not be thwarted by Courts when the language is so clearly to the contrary.

Secondly, petitioners' argument evidences an unfounded concern that the Bankruptcy Court will be unable to control its own proceedings once parties in interests have intervened. This is absurd. Every adversary proceeding is controlled by extensive bankruptcy rules and procedures and the Federal Rules of Civil Procedure, which dictate the method of conducting the controversy. Clearly, within these applicable rules, the Court, as well as the parties, have the opportunity to insure the fairness of the proceedings and the manner in which the matter will be brought to a conclusion. All that Congress has done in enacting §1109(b) is to allow parties an interest, i.e., creditors' committees, into the proceeding, it has not changed any of the rules.

Thirdly, the petitioners' fears of thousands of creditors or stockholders intervening in a particular case are groundless. As petitioners well know, the ability to participate in an adversary proceeding is available, as a practical matter, only to those who have the greatest interest in the outcome. Can the petitioners seriously believe that any "party in interest" would seek to intervene in any matter at its own expense, except in that exceptional case where the outcome has the most direct effect on that party.

Finally, the most compelling rejection of petitioners' arguments regarding the proper construction of the statute is found in the decision of Judge Stern. Judge Stern reasoned that traditional notions of due process and fair play dictate that persons having an interest in a proceeding be granted the right of notice and hearing. Judge Stern inferred that such was the sense of Congress in enacting §1109(b). He stated:

> This is a sheer question of law construing what is required by a statute which appears on its face to give any party at interest the right to appear and be heard before the Court.
>
> More, you know that kind of comports with what most people expect Courts to do; namely, if someone's interests or rights are to be adjudicated by what the tribunal does, it is usually in the ordinary course of events that people expect that that party should have the right to be heard. Not as a matter of grace, extended through an amicus curiae friend of the Court. Not as a friend of the Court, but as a party in interest fighting for what those interests are. Heard not as a favor, but because they are a party in interest. (Petitioners Appendix C, p. 31a-32a).

Clearly, both the District Court and the Court of Appeals decided this matter correctly.

For all the reasons expressed above, it is respectfully submitted that the petitioners have failed to establish adequate grounds for the granting of certiorari. The decisions of the District Court and Court of Appeals are correct and need not be reviewed.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

NOLAN, O'NEILL & MOORE,
Attorneys for Respondent, Official Unsecured Creditors' Committee,
By: THOMAS J. O'NEILL,
Counsel of Record.

Dated: January 18, 1983